UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

E.F., et al., Plaintiffs, vs. NEWPORT MESA UNIFIED SCHOOL DISTRICT, et al., Defendants.	Case No. 8:14-cv-00455-CJC-RNB

REPORTER'S TRANSCRIPT OF
MOTION HEARING
MONDAY, AUGUST 24, 2015
1:31 P.M.
SANTA ANA, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
FEDERAL OFFICIAL COURT REPORTER
411 WEST FOURTH STREET, ROOM 1-191
SANTA ANA, CALIFORNIA 92701-4516
dhinospaan@yahoo.com

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

LAW OFFICES OF KATHLEEN M. LOYER, INC.
BY: KATHLEEN M. LOYER, ATTORNEY AT LAW
940 Calle Amanecer
Suite L
San Clemente, California 92673
(949) 369-1082

FOR THE DEFENDANTS:

HARBOTTLE LAW GROUP
BY: S. DANIEL HARBOTTLE, ESQ.
18401 Von Karman
Suite 200
Irvine, California 92612
(949) 428-8780

SANTA ANA, CALIFORNIA; MONDAY, AUGUST 24, 2015

1:31 P.M.

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THE COURTROOM DEPUTY: Calling Item No. 3, SACV-14-455, E.F., et al., versus Newport Mesa.

Counsel, please state your appearances.

MS. LOYER: Kathleen Loyer representing the plaintiffs.

THE COURT: Good afternoon, ma'am.

MS. LOYER: Good afternoon, Your Honor.

MR. HARBOTTLE: Dan Harbottle for Newport Mesa Unified School District.

THE COURT: Good afternoon.

I have the defendant's motion for summary judgment before me. There is, I think, a few questions I had, and then I want to give both sides an opportunity to say anything else or reiterate what they think was the important points in their briefs.

Just the way I framed these issues is what evidence is there before me to demonstrate that the district acted with deliberate indifference? If you could highlight that evidence from the plaintiff's standpoint, that shows deliberate indifference and then defense take the counter. Tell me why there's no evidence of deliberate indifference in the record.

This is a question I have about the ADA claim. Isn't -- I

sense that is duplicative and based on the same alleged intentional discrimination as the 504 claim. Do I have that right, or do I have that wrong? And if I have it right, tell me why I have it right. And if I have it wrong, tell me why I have it wrong.

01:33PM

And then finally, it's a leading question, isn't there an immunity problem with plaintiff's eighth and tenth causes of action? Those are the issues I have. It is the defendant's motion, so why don't I hear from the defendant first.

01:33PM

MR. HARBOTTLE: Thank you.

You find this functions fine up here on the side like this?

THE COURT: Yeah, that's fine. Lawyers put it there because I'm in the middle of a trial. And when I have a trial, they find it easier there. But if it would be more comfortable for you, you can put it right there in the middle close to you.

01:34PM

MR. HARBOTTLE: Okay. Well, your questions, I think, are right to the heart of the matter. And the first one obviously, I think, given the facts that we have cited in the brief and the evidence that we've cited in the brief and the uncontroverted facts, we don't think there is evidence of showing deliberate indifference, which is a pretty high standard in what would apply under both Section 504 and ADA.

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The standards are virtually identical. The language is slightly different in the elements as they're set forth in the

504 context. The word "solely" on the basis of disability appears there and on the ADA context. It's on the basis of the disability.

So the plaintiff showing even just to get over the threshold of a prima facie case is that the act claimed discriminatory was performed or undertaken on the basis of disability or solely on the basis of disability. And the threshold for the damages is where Your Honor's question lies, and that is, was there -- is there evidence of deliberate indifference? And the -- many things that we pointed out in the brief -- I could go over them, but I'm sure you're familiar with them.

The key couple of things are the -- first of all, the testimony of Dr. Murphy, who was found to be extraordinarily qualified, and whose report was found to be appropriate and whose results in her report were found to be appropriate and accurate in all respects by the ALJ and affirmed by the Court. The opinion that Dr. Murphy derived from her report and her subsequent work with the student was that as of February 2012, the point at which the parents were hoping to have an iPad for educational communicative purposes, he was not cognitively ready for that step. The ALJ ultimately disagreed.

We didn't make -- we didn't appeal on it because we didn't think it was reversible error, we simply thought it was a difference of opinion between our expert and the judge whose

job it is to determine which expert she, in this case, found more persuasive.

Honestly, we felt the evidence was much more solid on our side for this question. But as you also know, and I think this is a critical fact in response to your first question, the district very soon, quote-unquote, according to the ALJ and upheld by the Court, provided -- permitted the student to utilize the iPad in the classroom.

So there was really no evidence whatsoever, both from the administration level, the educational level, and the teacher level that anyone had anything other than his best interest in mind and an opinion from an expert in the form of Dr. Murphy that he wasn't yet quite capable of utilizing the iPad for communicative or educational purposes. But they gave him one in the classroom. They let him use his in the classroom for entertainment purposes. And that was throughout the rest of the process until January 2013 when we, in fact, made the offer of an iTouch device in the IEP.

There's also his teacher's testimony that we quoted at some length in the brief and put into the evidence that she felt the same way and that she and Dr. Murphy were collaborating along the way based on his goals, based on his level of readiness, and the goals themselves were upheld in all respect by the ALJ all the way through including the functional communication goals.

So if the goals are appropriate and the -- we had a qualified expert both a speech-language pathologist and a BCBA, behavioral therapist doctoral level felt -- rendered the opinion that he wasn't ready, that's a rational explanation which, under the TBK, which was recently addressed by the Ninth Circuit and upheld in most part, is perfectly sufficient to overturn or to reject the argument of deliberate indifference.

The TBK specifically says so long as there's a rational explanation for the district's undertaking of whatever accommodation it undertook or proposed, then there is per se not deliberate indifference.

I think that the progress that the student was making all along and as measured appropriately by the judge and by Your Honor in affirmation of the OAH decision speaks to the deliberate indifference. This student was making measurable progress throughout the course of the case.

And shifting briefly to the evidence presented by counsel, we went in great detail through the uncontroverted facts that were either disputed or undisputed, and we went through additional facts that were set forth by counsel. None of those, neither the disputed facts that we presented or the disputes as to the uncontroverted facts that we presented, nor the alternative facts remotely rise to the level of a showing of deliberate indifference. And that goes to the summary

judgment standard.

Under *Anderson*, if there is no way a jury could find for the non-moving party, if there is not sufficient evidence to support that finding that they seek, then summary judgment is appropriate.

Shall I move to the second and third questions?

THE COURT: Yes.

MR. HARBOTTLE: Okay. You're correct in this respect. The ADA and 504 allegations are very similar. I quoted in detail the -- I think it's Paragraphs 217, 218, 219, in that range on Page 63 or so of the Complaint, that specifically calls out under the *Wong* case that the ADA and 504 as pled are substantially similar analyses and are analyzed the same.

In the 504 allegation, counsel put together a Complaint that specifically says the minor claims that his 504 rights were violated by -- a violation of his rights to a FAPE under Section 504 due to deliberate indifference. That's Paragraph 219 or thereabouts. It is not -- it does not get more clear than that, that that's the basis of the claim. It's not something other than a fake claim.

Under the ADA, an analogous paragraph was written that also includes a direct recitation of the FAPE claim under 504, and a two-word or three-word additional phrase talking about access and benefit or -- access and benefit is what the

language is. We addressed the access and benefit prong of that claim under the progress analysis from February 2012 to February 2013 because he clearly was making progress as measured by the ALJ's decision and affirmed by the Court.

01:41PM Again, though, under the ADA in the pleading, it is a FAPE claim under Section 504 that undergirds the majority of the ADA claim, maybe all of it. Under K.M. itself, a finding of a lack of an IDEA/FAPE violation per se means there's no FAPE violation under 504. So to the great extent that the claims 01:41PM overlap -- that the FAPE claims overlap, which they do tremendously, almost exclusively in this case, the OAH decision is affirmed by the Court, takes care of those claims. They are precluded. And it's also K.M. that specifically says that nothing in that decision changes the normal rule that decisions 01:41PM under the IDEA can preclude determinations under Section 504 and ADA.

The only thing about that case that's different is that they -- the plaintiffs in that case specified that 28 U.S.C. 35160, et seq., is the basis for their ADA claim. And 01:42PM in this particular case, counsel cited 28 U.S.C. 35130(b)(3), I believe it is, as the basis for their claim. And that section is a general discrimination claim. It's just general discrimination as if -- under the FAPE standard as pled in the rest of the Complaint.

01:42PM K.M. very clearly states -- can't give you the page cite,

but it's as clear as it can be, that neither K.M. nor the companion plaintiff in that case, D.H., made any claim whatsoever under the FAPE standard under either 504 or ADA. That fact in itself based on the pleadings distinguish the two cases.

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And the Court later goes on to say that it's addressing an extraordinarily narrow question as to that particular set of ADA regulations, as to deaf and hard-of-hearing children. The rest of the case supports precisely what this Court ought to do and what our motion asked the Court to do.

01:43PM

Finally, I think on the immunity question, I don't think there's any question whatsoever that the district is immune from liability on this. We pointed this out back in April. It's one of the exhibits in mine, declaration for the motion, it's on AR -- Page 83. And it very clearly states that these causes of action, one of which has been already dismissed, are subject to immunity under the Eleventh Amendment.

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As you saw, there was a stipulation prepared by plaintiff's counsel stipulating to cause of action No. 10. No. 8 was an issue for them, but No. 10 they agreed to. And time got the better of us, and we were trying to incorporate other claims into that stipulation so we wouldn't have to file multiple stipulations. And by the time we got around to it, to following up and finishing the meet-and-confer, counsel had changed their mind and they didn't want to stipulate to 10

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anymore. But it's undeniable that under the law citing the brief, both of those causes of action are subject to the immunity defense.

And I want to finalize that discussion briefly on the tort claim. He didn't raise it, but I think it's important, obviously if you're going to grant on immunity, that's precisely what we're asking for. But it's important to look briefly at the chronology of the tort claim issue. Because what we don't want to have is another filing in State Court that keeps this case alive.

The timelines as set forth in the brief are extraordinarily clear. It was filed in March of 2014 -- the Complaint was filed in March of 2014. The underlying due process Complaint was filed earlier obviously. And it -- underlying due process Complaint had a single line or two specifically calling out that plaintiffs were putting us on notice that they wanted to resolve disputes in an ADR process because of some injury, and they might file a lawsuit.

As we detailed in -- in gory detail on the brief, the Tort Claims Act has very strict procedural guidelines, none of which were followed here, and all of which would preclude the claim under the Tort Claims Act as well as the immunity provision of the law. I'm glad to answer follow-ups on that or come back up at the end of the process.

THE COURT: I guess just a couple questions for you.

It's on the ADA cause of action. As I understand it, there's two theories of liability. One would be -- under Title II, one theory would be the failure to provide a FAPE under Section 504, and then the other theory is effective
01:45PM communications. And as I understand it, what the ALJ found and what I affirmed was that there wasn't electronic assistive technology device brought. Why isn't that sufficient -- since that was alleged, that was found, why isn't that sufficient under this second theory, under ADA for effective
01:46PM communications?

MR. HARBOTTLE: Two reasons: No. 1, the Court in K.M. does not specifically say that FAPE in and of itself -- FAPE determination in and of itself isn't sometimes enough. But the second and more important reason here is something that
01:46PM I think is glaring in this particular instance, and that is that if you read this Complaint as I have many, many times, you do not see anywhere in it an effective communication claim under 28 U.S.C. 35160, et seq. They're in separate sections of the ADA regs. There are separate theories of recovery, and we
01:46PM cite law -- several cases in the motion that specifically say pleadings are not permitted to be amended by virtue of a -- seeking to overcome a summary judgment motion.

The case has been pending for 17 months. There has not been a single request nor motion to amend. It is very clear --
01:47PM counsel cited precisely to the numerical beginning point, even

a subsection, in fact, of the general discrimination provisions of the ADA as her theory of the case. Those are not effective communication provisions. That's not it. It is unavoidable to conclude that a 93-page Complaint in the detail with which this was prepared didn't contemplate alternative theories.

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And by the way, K.M. came out before this case was filed. So this is an available theory of the case for them in their Complaint, but it was not pled. Had they meant to plead 28 U.S.C. 35160 and those provisions, then they could have and should have done so before 17 months have passed.

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Finally, I don't think there's any law outside it that says that the ADA standard of deliberate indifference is not applicable when there's an ADA claim generally speaking.

So in our view, the deliberate indifference standard, even if there had been an amendment 6, 8, 10, 12 months ago would still be necessary as an obstacle for a jury to find damages liability under ADA. And it just isn't there. No matter how you frame it, No. 1, it's too late to frame it this way now. You can't do it in a summary judgment context. No. 2, even if you permit reframing, you can't prove the deliberate indifference standard.

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And the T.B. case is a little interesting on this point, because in that case the Ninth Circuit overturned a single bit of the ADA analysis in the district court case. And then Ninth Circuit case found that a jury could find deliberate

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indifference theoretically, or maybe not, because the OAH decision previous to the litigation actually specified what kind of training the administration -- the person administering the gastronomy should have. And the district, for reasons that from past understanding, didn't follow the OAH decision. They had an IEP before it came out. Then it came out and they didn't monitor the IEP.

So the T.B. court said, look, the district court didn't find a violation, but the Ninth Circuit said when you have a court order telling you what to do and you don't do it, then at least a jury could make that decision. Here we don't have that at all. No. 1, they had pled those -- they pled the right allegations. And again, as in K.M., the Court was very clear to say there that those two plaintiffs had not made any claim under the FAPE element, the FAPE regulations under 504 or ADA. So I think the answer is neither procedurally nor substantively would make any difference. It shouldn't be permitted. And even if it were, it wouldn't make any substantive difference.

THE COURT: All right.

Ms. Loyer.

MS. LOYER: Thank you, Your Honor. If I could just address the chronology first, kind of where Mr. Harbottle left off. We had some delays that perhaps were self-inflicted and some delays that weren't self-inflicted. And there's been a lot of reference made to a 93-page document. And part of that

was because of the appeal as was some of the challenges to the remedies listed generally. And so by the time we got our appeal done and a decision delivered, it was -- we were kind of in a mutually agreeable holding pattern, not to do anything unnecessarily. And so I think that that's partially what frustrated us all, and I don't say that in a sense of a negative, it's just frustration moving forward and not moving forward in ways that were going to incur expenses on either side of this case.

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And so I think that with regards to the length of time and some of the actions that were either taken or not taken, it was related to us all trying to be very frugal in the approach of the proceedings in this case. So I think we're kind of justified and felt we were mutually at the time.

Now as to your questions, with regards to the deliberate indifference, we respectfully disagree with opposing counsel as to whether we can prove it or not. He relies heavily on the ruling, the OAH ruling; however, both the Ninth Circuit as well as the directives from the DOJ make it very clear that what happens in the underlying case really isn't what's applied later on. We're talking about different standards of review for all three of these laws. And to lump them together indiscriminately does injustice to the case as well as the minor that we're speaking of.

And so our perspective, based on the criteria of the three

separate laws, is obviously we disagree with the findings of the OAH officer. Moving beyond that to 504 and ADA, we submitted evidence before in our opposition that the 504 causes of actions were dismissed by the ALJ. They were not heard. And so -- because of the lack of jurisdiction. So this is the first time that this -- these issues are being brought before a finder of fact as well as the Court to determine the applicable law and how it is applied. So we would respectfully say that we had no choice but to bring those issues forward.

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Part of that being as well is the remedies that we're seeking are damages. And damages are not available under the IDEA. We did breach that aspect of the case, and I -- unless you have any specific questions later, I don't think I need to be redundant about it.

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And our theory of the deliberate indifference is based on the fact that these decisions were made by what both counsel and the ALJ found to be very credible witnesses who should have been aware of the harm that could have been caused by not providing this child appropriate communication intervention.

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And that's something that plays to both the 504 as well as the ADA. If they are that highly qualified, they should have known.

And we produced affidavits or sworn declarations from the experts that are working with this child now and have been for the last 18 months, who not only agree with the concept that

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this was something that should have been done for this child much sooner, but more importantly the damage incurred, the impact on his cognitive development.

The district relied heavily on their self-reporting of his progress, but they neglect to bring up the fact of how small that progress was and how low his goals were set. For whatever reason that ALJ thought that was sufficient, we heartily disagree that that was a show of progress. The administrative record is riddled with information where the parents repeatedly went back and said, "This isn't working. He's not progressing. He's not progressing." That made him socially isolated, that it heavily impacted his ability to access any instruction when it was offered. And so we definitely have a different take on the case, the facts of the case and the results of what happened, which from our perspective puts several material facts in play here that need to be determined.

With regards to the comments that he was given this iPad -- or he was allowed to bring his iPad in, that was something that was not used as a communication device, nor did the district make any effort at that time as a communication device.

The IEPs that are contained in the administrative record said that was used as a reward. He was allowed to play games on it. It wasn't interactive with anybody in the classroom. As a matter of fact, the way they allowed him to use it

isolated him more during free time. He did not interact with other children. So it completely had a reverse effect the way they claim to have been using it.

The other aspect of that is it wasn't facilitated properly when it was provided. Our experts who made recommendations, who understand this, and even the assistive technology specialist at the district employed and participated and made recommendations for its use. It wasn't carried out that way. And so when we put our team together and started providing this child the intervention that was recommended, the way it was recommended, lo and behold he started communicating across environments. And so that, to us, provides the Court with the ability to see the difference when you use that device for a communication device versus a reward. He -- it was not used that way, and it continued to not be used that way consistently by their own admission.

We have the transcript of the IEP where that was discussed that they were not using it on the playground. They were not using it during instruction time. It's a fact-driven case, and we clearly have a material fact in dispute.

With regards to the immunity problem. I think that our -- we relied on a case *CA versus William Hart Junior High School District*. It is a Fourth Circuit -- or excuse me -- a California Supreme Court case, and they did establish a duty and the fact that when you engage in these programs and accept

the funding, the federal funding, it does abrogate your immunity. And that's the basis that we've been arguing the immunity.

Now, I understand there's a problem with us being in
01:58PM Federal Court. I feel like we -- again, we're trying to avoid having parallel suits in two different court systems. We would like to avoid that happening.

And the other thing I'd like to mention and opposing counsel mentioned, we tried very hard to settle this case from
01:58PM Day 1. We spent a year -- over a year in the administrative process, multiple IEP meetings, multiple ADR discussions. We've always tried to do this in a way that wouldn't end up here. And unfortunately, we are here. And so we would ask the Court to allow our case to be presented in the context that it
01:59PM needs to be presented.

The ADA is based on the concept of communication. I don't see how you can separate a claim under the ADA by subdivisions at this particular state. We're still in the midst of discovery. We're still developing all of our -- all the facets
01:59PM of our case. We have our -- as I mentioned in our brief, we have a cutoff date of October 23rd. And so I don't see that cutting us off at this point in time really allows us to fully develop our case and present it to you with all the facts and all the laws in a cohesive way.

01:59PM I would like to say as I did in my brief that if the Court

feels that we are insufficient in any way, we are respectfully requesting the ability to amend, because we haven't amended yet. And again, we did that because of the mutual efforts from all parties to try and sort this out and avoid any protracted litigation.

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Now with regards to some of the other points that counsel made, there is the effective communication issue under 504 -- excuse me, under ADA, and there also is the failure of FAPE. We feel that we have both. We feel the effective communication one, we've already proven that case. That's the one point that the ALJ did agree with us and did find our expert credible and made an award. But that award was based on the Raleigh standard which, as we discussed in the brief, is a much lower standard than the ADA.

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The direction given by the DOJ and all the amicus briefs that he has submitted for cases that are related to this aspect of the ADA support that concept that there is no requirement for deliberate indifference under the effective communication. It's a matter of access. And clearly he did not have access. Even his mainstreaming that's required under IDEA was pushed into that classroom. It wasn't he went to a general ed classroom or general ed instruction.

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Even his one-on-one DIS services were provided in that classroom. He was very much isolated. And his -- again, his communication device, we were advised he wasn't allowed to take

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it out on the playground because he didn't want to be responsible for it or they didn't want him to have a strap on him. So there's a lot of facts here that play into how this clearly did not provide him equal access to nondisabled peers.

02:01PM And again based on the declarations that we provided, we feel the people working with him now are credible. They have credentials. They've been around. And they are going to be able to testify to these things that I'm suggesting to you that were mentioned in their declarations.

02:02PM The two experts that opposing counsel mentioned were the district's speech and language path and the teacher. Again, they're speaking to a much lower standard. But their policies towards children with this level of impairment, especially in the autistic community, does state volumes as to what their

02:02PM take is on children who don't progress at the speed they think they should, and they have a mental retardation classification attached to them.

It shouldn't make any difference whether he's mentally retarded or not. If he's nonverbal and has no function of

02:02PM communication based on their own testimony of all the different methods they tried and were not successful, it begs the question, why wouldn't you try AT? It was a simple test to try and they didn't do it. I think I've answered all three of your questions, Your Honor. Thank you.

02:03PM THE COURT: I think you have.

MS. LOYER: Okay.

THE COURT: I notice there was one issue candidly that I don't think is proper for summary judgment, that deals with the attorney's fees. But I take it you haven't supplied information, you know, the work that was done, how much time was spent, for example, just on the claim that you have prevailed, the electronic assistive technology device.

MS. LOYER: I have not submitted it because I felt they were incomplete, Your Honor. And in our response we said that we were still working on certain aspects in the demand and that they would be provided in a timely way. And that kind of plays into the waiting on the appeal, because obviously the underlying administrative hearing we had negotiations regarding attorney's fees even prior to filing based on the one issue that did not move forward. And so there was some work done, but I did not submit an entire billing statement for the underlying administrative hearing, that's accurate.

THE COURT: Okay.

MS. LOYER: Not because we are refusing, we just haven't provided it yet thinking we wanted to provide a more complete first finding what happened with the appeal. And now we are in the midst of this MSJ. But if it's that important to have it prematurely, we're more than happy to provide it. It's not a keepaway. It's just trying to be efficient in presenting it.

THE COURT: I understand. Thank you.

MR. HARBOTTLE: I'll start with that last point. And normally I would agree that the motions are usually made as a separate procedural matter post adjudication. But in this particular case, uniquely it was pled as a cause of action. And so we treated it as a cause of action, and we expected to see all the supporting documents in the initial disclosures. There were no fee invoices of any kind.

We expected -- we did a request for documents. Specifically it's the number -- No. 1R, Request 1R, specifically calling out all documents supporting a fee claim or fee recovery. As Your Honor said, plaintiff prevailed on a single AT issue. And they made noise about potentially recovering feet on that. So it was a perfectly ripe question to ask, and it was perfectly ripe in terms of time to ask it and to -- expect it in the initial discovery and to ask it in discovery.

It is just the case under the law that if you plead a cause of action like this and you fail to comply with initial disclosures and comply with discovery requests, that you are precluded from presenting that evidence later. That's the way it works.

THE COURT: I have no problem with you asking for it in discovery, but I've just got to be frank with you. In all my experience, both as a state and federal judge, I've never

seen attorney's fee issue raised as part of a claim of a Complaint.

MR. HARBOTTLE: Neither have I, Your Honor. And I was also intrigued by your directive that we filed the motion without exception to any of the 12 causes of action. And then we spent a lot of time thinking, do we include the fee claim or not, because it is a cause of action. The Court issued a request that we file with respect to the remaining causes of action, so we did so. I think it has merit, and it should be granted on that ground as well, but I understand your sense of it.

I want to go back -- I want to go back to the discovery issue and the amendment issue a little bit, and that is important. I didn't raise it in the pleadings, and I wasn't going to raise it initially, but it is the case as a fact that it's demonstrable in the body of the joint report that we filed initially in the action that my client had proposed delaying discovery at all until after the adjudication of the IDEA claim. And both counsel, both Ms. Loyer and her co-counsel, Mr. Brown, refused to do that. I expected discovery right out of the box and none came. None came for 14 months.

Now, having offered the delay, having offered the opportunity not to overlap the adjudication of the appeal with the discovery process, I think it's highly prejudicial to us now for counsel and her client to say we've just been waiting

for the appeal to be done.

If you look at the joint report, there's some language in there about we had proposed delayed discovery, and then there's a separate statement that plaintiffs don't believe discovery should occur in phases. That was the bottom line in the discussion we had about discovery. So I don't think it's really appropriate to now claim that there hasn't been ample opportunity as the law requires there be. There has been ample opportunity. There's been 17 months for discovery to be done.

02:08PM And we're also not in the midst of discovery. There's been this week or last week the second request for documents sent by counsel. The first wasn't sent until May, 14 months after.

The initial issue, maybe the most substantive issue is 02:08PM this deliberate indifference question and the ADA versus 504. If you look at our Ps and As out of the motion, Page 4, and you look at the two quotes there from K.M., both on the ADA and the 504, you see that it's mistaken to say that findings with respect to the IDEA/FAPE standard do not apply preclusively to 02:09PM the 504 standard and the ADA standard. They just do. K.M. says they do and both the ADA and the 504. And as strong as it is in the ADA context, it's stronger in the 504 context.

You made a FAPE claim under 504. And if you've lost it at the IDEA level, you lost it at the district court level. 02:09PM That's why the only thing live with respect to either of those

is the AT issue. None of the rest of it matters at all. It's all subject to the underlying preclusive effect of the OAH decision, and Your Honor affirmed that.

And frankly, it's the same sort of after-the-fact creation of an argument that is not permitted at the opposition to summary judgment level that somehow there is an ADA effective communication claim based on specific regulations as set forth in K.M., very clearly a year or so before, at least several months before this case was filed. Had that section of the regulatory scheme been considered as a theory of the case, it would have been and should have been pled. And it's highly prejudicial of us now to just add in a whole collection of potential claims that were not conceived of initially.

And I think counsel is correct that there is a good-faith relationship between the parties and the counsel, and there is -- there was some hope that we could resolve this. It didn't happen. But there is -- it is where it is right now. And the law is very clear that you don't get a second chance to correct your pleadings, especially after this long a time, nor do we continue to do discovery just in order to avoid summary judgment.

The other thing I want to end with is that counsel, as there were -- I think there were 28 uncontroverted facts in our statement of uncontroverted facts, 11 of them, when counsel did their response, undisputed. So 11 of the 17 were undisputed.

Out of the 17 -- or out of the 28, of the remaining 17, two of them had actual evidence in support of the dispute. The other evidence was things like the DOJ, amicus brief, which isn't evidence, closing brief before OAH -- counsel's closing brief before OAH and the responsive brief here -- or the opening brief here that recite -- recitation to a footnote within the very document without any evidence whatsoever.

Of the two facts that were specified as uncontroverted and material and sufficient to grant summary judgment, one of them referred to an entire 230-page section of testimony without any specificity as to what the facts within that were -- the allegations or facts within that would support opposition to summary judgment. And the other was a single page of an IEP extracted from the document itself that purported to support some sort of policy argument. And I guess that's the point is the theory of the case seems to be some vague sense that there is a policy that is at work here that was implemented here that's inappropriate and caused this student harm, but there isn't any evidence to that.

I want to point out that mostly what we're hearing is argument. There's very little facts. We added some time for counsel to do our opposition, gave her exactly as much time as Your Honor gave us to do our motion, and I expected a recitation of evidence that we would have to refute as to each of those uncontroverted facts, and it was only with respect to

those two. And in both of those cases it was insufficient. As a matter of theory is one thing, in the summary judgment context, material -- genuine disputes of material fact are what will drive the matter as long as the law is cited correctly.

02:13PM The last thing I want to say is on the discovery in this same point, in order to justify further discovery, a party must show under controlling law what specific facts they would be able to extract through the discovery process -- they hadn't been able to do it so far -- and how those facts would preclude 02:13PM summary judgment. That was supposed to have been done in the opposition. We're now to the point where we're closing in on trial, and we've had 17 months of adjudication without development of any facts that would justify not granting the summary judgment motion as pending. Thank you.

02:14PM THE COURT: Thank you. Anything further?

MS. LOYER: Just briefly, Your Honor.

Again, I go back to our timeline and the discussions that we've been in, and I don't think opposing counsel would disagree, but he might, until we receive the Court's order that 02:14PM a motion be filed, neither party at that point in time were contemplating -- contemplating a motion for summary judgment knowing that we had just filed a joint stipulation to extend discovery.

And so I think it's -- I think it's hard to get -- for me 02:14PM it's hard for me to get my head around the position that

counsel's now taking when every move we had so many discussions and letters and nothing was done lightly and nothing was done without a significant amount of meet-and-confer and exchanging information. And so based on the pace of the case at the time is what drove what was done and when it was done.

02:15PM

Could it have been done faster? Of course, it could have been done faster. But based on where we were and the communication we were having, we all acted in good faith. And I think it would be highly prejudicial to my client to not consider that, that nothing was done in any way to disrupt, delay, purposely not cooperate. I mean, we've both admittedly known each other for a long time and have a very good relationship. So I would again ask the Court to consider all the circumstances surrounding this.

02:15PM

02:15PM

And I, of course would not deny that there was a request to delay discovery. I do have a co-counsel. Maybe some day he'll be here for everyone to meet. It was a mutual decision. And through the process of the meet-and-confers that we've had, we did delay it. We didn't have a formal stipulation, but we did acquiesce to counsel's request. And the facts are there to see, that no discovery took place until we got closer in on things and we were finally going to have our oral arguments on the appeal.

02:16PM

And so, again, my rebuttal to these comments is that everything was done in good faith, and I would hope that we can

02:16PM

continue to move forward. And the fact that we haven't filed an amendment, we haven't requested to file an amendment, again, good-faith effort to not encumber the Court or inflate the process.

02:17PM Unless you have any other questions for me, Your Honor, I think I'll close on that.

THE COURT: I don't, but I appreciate the arguments of both sides.

Let me noodle this for a while, and I'll try to get a 02:17PM decision out shortly.

MS. LOYER: Thank you, Your Honor.

THE COURT: Thank you.

MR. HARBOTTLE: Thank you, Your Honor.

(Proceedings concluded at 2:17 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME COURT REPORTER, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: October 13, 2015

*/S/ DEBBIE HINO-SPAAN_*

Debbie Hino-Spaan, CSR No. 7953
Federal Official Court Reporter